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No. 476

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

SEARS, ROEBUCK AND CO., *Petitioner*

v.

CARPET, LINOLEUM, SOFT TILE & RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO,

and

FRANCIS SPERANDEO, Regional Director of the Twenty-seventh Region of the National Labor Relations Board, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR REHEARING OF SEARS, ROEBUCK AND CO.

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INTEREST OF THE AMICUS CURIAE *

The interest of the American Retail Federation (hereinafter referred to as the "Federation") in this case was fully set forth in its Brief in Support of the Petition for Writ of Certiorari, which was filed pursuant to permission granted by Order of this Court

* This brief is filed with the written consent of counsel for both parties in accordance with Rule 42(2) of the Court.

when consent of all parties was not given, and its Brief in Support of the Position of the Petitioner. The thrust of those briefs was that the instant case raised recurrent and important questions of first impression, concerning an area of vital interest to the retail industry and all employers, which warranted this Court's attention. The Court's subsequent failure to resolve these questions—and the virtual certainty that future efforts to obtain such a resolution by this Court will similarly be frustrated by a determination that the particular controversy involved is "moot"[1] —only underscores the Federation's concern.

The Federation is aware that "the Court has rightly been parsimonious in ordering rehearings", but it also concurs in Mr. Justice Frankfurther's observation that "the occasions on which important and difficult cases have been reargued have . . . enchanced the deliberative process".[2] The instant situation presents such an "important and difficult" case. It is probable that,

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[1] In its Reply Brief, the Petitioner asserted that it had no reason to doubt that the 8½ months which elapsed in the instant case between the district court's ruling on the petition for injunctive relief and the subsequent issuance of the Board's decision was not a typical period (Reply Brief, p. 19). Clearly, therefore, based on this assumption, if the present case is deemed moot it would be practically impossible for an employer ever to obtain review by this Court of the issues here involved prior to a Board decision rendering the controversy moot. Yet, as the Petitioner observed, each erroneous district court decision "becomes a precedent to be used against the interest of litigants who will be similarly unable to obtain review of their own 'mooted' appeals" (Reply Brief, p. 20). Cf. the reference in Mr. Justice Marshall's dissent in *Hall* v. *Beals*, 396 U.S. 45, 24 L. Ed. 2d 214, 220, to the dangers of "misleading precedent" as "one of the unfortunate consequences of a rigid view of mootness."

[2] *City of Detroit* v. *Murray Corp.*, 357 U.S. 913, 915 (dissenting opinion).

unless rehearing is granted, the Court will not again have the opportunity to pass on the critical issues involved herein;[3] this ground alone is sufficient, as the Court has recognized in other cases,[4] to warant rehearing. In addition, based on contentions *not* discussed by the Court in its opinion,[5] the Federation believes

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[3] See footnote 1, *supra*.

[4] See, e.g., *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47. Cf. *Silver King Co.* v. *Conkling*, 256 U.S. 18 and *Parks* v. *Simpson Timber Co.*, 389 U.S. 909.

[5] Although the Petitioner advanced various arguments as to why the instant case should not be considered moot (Reply Brief, pp. 12-27), the Court's opinion only addressed itself to the Petitioner's contention that there had not yet been a "final adjudication of the Board" here within the meaning of section 10(1), an argument which was rejected in light of Section 10(e) of the Act. While the *amicus* does not desire to reargue this point, and will only seek to demonstrate the lack of mootness of the present controversy on the basis of arguments *not* dealt with in the Court's decision, two brief comments should be made as to the adequacy of the relief afforded by Section 10(e). First, an injunctive remedy under Section 10(e) does not become available until both a Board order has issued and an enforcement or review proceeding has been commenced in the court of appeals, an elapsed period in the instant case of nearly one year, during which no protection is available, if 10(l) relief is denied, for the employer confronted by unlawful union picketing. Second, the *amicus*' research disclosed only one case where the Board sought to obtain 10(e) injunctive relief in a secondary boycott situation, *N.L.R.B.* v. *District Council of Ports of Puerto Rico International Longshoreman's Ass'n*, unreported decision of the First Circuit Court of Appeals, March 21, 1953, Vol. VIII, *Court Decisions Under the NLRA*, p. 821, and in that case such relief was denied on the basis that the acts there complained of also constituted "new and independent unfair labor practices in respect to which the Board is empowered to issue a new complaint . . ." Thus, as a union attorney recently concluded, the Board "has almost never sought preliminary relief in the Courts of Appeal [under Section 10(e)] and has never asked for the priority treatment which the statute provides Board cases." Driesen, *The Uses and Abuses of Litigation in Labor Relations*, reported in 97 D.L.R. at Section F (BNA, May 19, 1970).

that the present controversy has not been rendered moot and that, for this further reason, hearing should be granted.[6] In short, the Federation again respectfully submits that the Court should resolve the issues of great public importance raised by the denial to employers of valuable rights intended to be exercised as part of the statutory scheme of the National Labor Relations Act.

ARGUMENT

A.

The paramount interest in appellate review, particularly as a check on abuse at the trial level, demands facilitation of appeals.[7] The mootness doctrine should not be applied to frustrate "the vital importance of keeping open avenues of judicial review'" nor to permit lower courts to be courts of last resort for the determintaion of important issues.[8] As one commentator recently noted: "If the Court is confronted with a substantial likelihood that an issue it believes moot will always arrive there in the same condition because of

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[6] See, e.g., *Cafeteria Employees Union* v. *Angelos*, 319 U.S. 753, 778 and *Brady* v. *Terminal R.R. Ass'n*, 302 U.S. 678, 688, 303 U.S. 10. Cf. *Hickman* v. *Taylor*, 327 U.S. 808, 328 U.S. 808, 876, 329 U.S. 495 and *Brinkerhoff-Faris Trust Co.* v. *Hill*, 280 U.S. 530, 604, 281 U.S. 673.

[7] See, e.g., *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 ("only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict excess to judicial review") and *St. Joseph Stock Yards Co.* v. *U.S.*, 298 U.S. 38, 84 (concurring opinion) ("The Supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly.")

[8] *Sibron* v. *New York*, 392 U.S. 40, 52.

[9] Cf. Mr. Justice Marshall's dissent in *Hall* v. *Beals*, 396 U.S. 45, 24 L. Ed. 2d 214, 220.

the inherent nature of the issue, the Court should not refuse review on the basis of mootness."[10] And surely this principle is particularly pertinent where substantial public rights would otherwise remain in judicial limbo. In such a case, the importance of the question involved, *standing alone*, may be sufficient to override technical mootness requirements.[11]

The foregoing considerations are especially apropos in the instant case. This Court has understandably been sensitive to the rights of private parties in proceedings before the National Labor Relations Board,[12] as well as to the rights of private parties in administrative proceedings generally.[13] It also has been in-

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[10] Comment, *Mootness on Appeal in the Supreme Court*, 83 Harv. L. Rev. 1672, 1692 (1970).

[11] Cf. *Powell* v. *McCormack*, 395 U.S. 486, 496 and n. 8, where this Court refused to dismiss as moot the claims of various constituents of Congressman Powell, objecting to his exclusion from the 90th Congress, notwithstanding the intervening termination of that session of Congress, the seating of Congressman Powell in the 91st Congress, and the "personal" nature of his "viable" salary claim (395 U.S. at 565, n. 9 (dissenting opinion)). See also *Friend* v. *United States*, 388 F. 2d 579 (D. C. Cir., 1967); *Dyer* v. *Securities and Exchange Commission*, 266 F. 2d 33 (8th Cir., 1958); and Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 Univ. Pa. L. Rev. 125 (1946).

[12] *United Automobile Workers* v. *Scofield (Fafnir Bearing Co.)*, 382 U.S. 250, where private parties were accorded rights of participation in Board proceedings notwithstanding that they could rely upon the General Counsel of the Board to present their cases on appeal. Accordingly, the private parties there had some protection available against the erroneous deprivation of their statutory rights. Here, however, unless the charging party is afforded standing to initiate an appeal from an erroneous district court 10(l) decision he will have no relief available from that decision when the Board refuses to appeal.

[13] See *Association of Data Processing Service Organization, Inc.* v. *Camp*, — U.S. —, 25 L.Ed. 2d. 184 (March 3, 1970) and *Barlow* v. *Collins*, — U.S. —, 25 L.Ed. 2d 192 (March 3, 1970).

creasingly concerned with delineating the proper accommodation to be reached between federal labor laws and the Norris-LaGuardia Act.[14] Congress similarly has evidenced a considerable interest in the regulation of unlawful strikes.[15] All of these important considerations are at the crux of the present case. Indeed, the Court now has before it, if such matters have not also been rendered moot, other important aspects of the overall issue of the right of charging parties to participate in Section 10(1) cases.[16] In these circumstances, and in view of the considerable difficulty that other employers will have in prosecuting appeals to this Court involving such questions,[17] the issues

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[14] See, e.g., *The Boys Markets, Inc.* v. *Retail Clerks Union*, Local 770, No. 768, *this term*; *Atlantic Coast Line R.E. Co.* v. *Operating Engineers*, No. 477, *this term*.

[15] See, e.g., *Hearings Before the Special Committee on Labor, Education and Labor, on H.R. 11725*, House, 90th Cong., 1st Sess. (1967); *Hearings Before the Subcommittee on the Separation of Powers, Committee on the Judiciary, on Congressional Oversight of Administrative Agencies (NLRB)*, Senate, 90th Cong., 2nd Sess. (1968).

[16] *Samoff* v. *International Association of Machinists, District Lodge No. 1 (Terminal Handling Co.)*, No. 1481, *this term*, where the district court, notwithstanding the express rights of participation accorded charging parties by the Section 10(1), nevertheless ruled that the charging parties there involved did not constitute "parties" and, accordingly, lacked standing to object to a proffered Board stipulation. The Federation also understands that a petition for a writ of certiorari to the Ninth Circuit will soon be filed in *San Francisco-Oakland Newspaper Guild* v. *Kennedy*, — F. 2d —, 69 LRRM 2535 (1969), *cert. den.*, — U.S. —, 69 LRRM 2537, based on the Court of Appeals' refusal to permit the charging party there involved to litigate the merits of the district court's dissolution of a previously-granted 10(1) injunction.

[17] See footnote 1, *supra*. In addition, the majority of members of the Federation are small employers whom the Federation is well aware can not bear the cost of appeal to this Court, particularly when, under the Court's decision in this case, that appeal

here presented are now in an appropriate posture for final resolution by this Court.

B.

Apart from the compelling reasons of public policy which in themselves fully justify a resolution of this case on its merits, a finding of mootness here detracts from, rather than advances, the successful operation of the judicial process. If, as stated in *Flast* v. *Cohen*, 392 U.S. 83, 106, the mootness doctrine is intended to insure that "the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the . . . challenge will be made in a form traditionally thought to be capable of judicial resolution", all of these prerequisites have been amply met in the instant case.[18]

Moreover, in contrast to the usual case where mootness is brought about by some event over which neither

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will probably be frustrated by issuance of the Board's order in the underlying Section 8(b) proceeding rendering such an appeal moot. Since employers with less than 30 members filed over 50% of the charges involving Section 10(l) in fiscal year 1968 (Thirty-third Annual Report of the National Labor Relations Board, Table 18, pp. 238-9), the Court's refusal to pass on the issues here involved effectively removes the only practical potential for resolution by this Court of such questions presented.

[18] The question of mootness in the present case was raised when the Court was considering the petition for writ of certiorari. Resp. NLRB's Br. in Opp., p. 2. This is not a case, therefore, where the occurrence of an event subsequent to the granting of certiorari moots the issues and dampens the interest of one of the parties in fully arguing the issues. To the contrary, here every reason existed for the parties to believe that the Court would resolve the questions involved on their merits and, accordingly, all of the contentions of the parties, as well as those of the *amici*, were fully advanced.

party has control, here the Board, one of the active litigants involved, may itself foreclose the channels of appeal by issuance of its order prior to a review of the 10(1) questions by this Court.

In these circumstances, even if it is assumed that "this Court cannot, in the present state of the record, render an effective judgment on the merit", the Court should nevertheless, "in the exercise of its supervisory appellate power, make such disposition of the case as justice may require".[19] As in *Goldberg* v. *Kelly*, . . .

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[19] *Walling* v. *Reuter Co., Inc.*, 321 U.S. 671. See also *Robinson* v. *California*, 371 U.S. 905. In *Walling*, the government urged exactly the opposite of its position in the present case, that the Court should affirm the issuance of an injunction notwithstanding that the respondent-employer, a corporation, was completely dissolved while the case was pending on appeal and, hence, there was no way in which an effective judgment on the merits could be rendered. This Court nevertheless held that the petitioner should not be deprived of the benefit of the injunction because of the present inability to issue and enforce injunctive relief, stating:

> "But review of a judgment of the District Court contemplates more than a consideration of the case by the Circuit Court of Appeals alone. The losing party in that court may secure further review here upon certiorari, if he so desires and if this Court, in its discretion, grants the writ. Thus appellate review of the judgment of the District Court had not been completed when respondent was dissolved, and the full review contemplated by the statute was frustrated by that dissolution. By reason of that action, the judgment of the Circuit Court of Appeals, which is not final because the case is pending in this Court, cannot rightly be made the implement for depriving petitioner of the benefit of his judgment in the District Court."

So also, in the instant case, the process of review had been initiated prior to the intervening issuance of the Board's decision. Since that process of review had not taken its full course, under the rationale of *Walling*, the full appellate process should not be frustrated by an event occurring *in media res*.

U.S. ..., 25 L. Ed. 287 (1970), the "underlying questions" remain unresolved, the continuing adverse position of the Board is assured, and the plaintiff, in effect, represents a class of interested persons.[20] The inherent nature of the issue here involved should not be a perpetual bar to judicial review by this Court of the critical questions presented.

C.

This Court has repeatedly recognized that where the dispute involved is a continuing one, whose consideration might otherwise be defeated "by short term orders, capable of repetition, yet evading review", the mootness doctrine should not be applied so as to bar review as the result of the time-consuming nature of the judicial process.[21] As in those cases, there is a lingering importance of the questions presented to *all* employers, rather than to just the particular litigant involved; there is also a substantial possibility of repetition of the erroneous decision of the district court, particularly in view of the unabated influence of the decision below, is considerable; and the potential that substantial cases will also evade review by this Court

[20] See Comment, 83 Har. L. Rev., *supra* at n. 10, at n. 87 and at pp. 1687-1692.

[21] *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498, cited with approval in *Carroll* v. *Commissioners of Princess Anne*, 393 U.S. 175, as well as in *Moore* v. *Ogilvie*, 394 U.S. 814, 816, where the Court found the issue there involved not moot because it reflected "a continuing controversy". See also *Sibron* v. *New York*, 392 U.S. 40, 52-3, where the Court's refusal to find a case moot was predicated, in part, on the state's ability to otherwise cut off final federal review in "whole classes of such cases" and the Court's inability thereby to afford a remedy against "repetitions" of the action there complained of.

is similarly high.[22] Clearly, therefore, application of the *Southern Pacific* doctrine is warranted in the instant case.[23]

CONCLUSION

In view of the foregoing, the Petition for Rehearing should be granted and, based on the reasons set forth in the Federation's previous *amicus* brief as well as in the briefs of the Petitioner the decision of the Court below should be reversed.

Respectfully submitted,

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[22] See footnote 1, *supra*.

[23] It is respectfully submitted, in agreement with the contentions of the Petition for Rehearing, that the Court's citation to *Brockington v. Rhodes*, 396 U.S. 41, and *Hall v. Beals*, 396 U.S. 45, in which the *Southern Pacific* doctrine was not invoked, is misplaced. *Brockington* involved a dispute which could never reoccur because the specific election those involved was over and there was no indication the petitioners would ever run again. *Hall* also involved an election which had already been conducted and, because of an amendment to the statute, the questioned residency requirement had been removed. In the instant case, the issue of whether an aggrieved employer is entitled to appeal an adverse 10(l) determination remains a viable one. Congress has not amended the statute by either granting or denying such a right. And, because 10(l) relief is of vital importance to the employer facing an unlawful strike, it is highly likely that the question here involved will arise time and time again.